



GAO

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Science Applications International Corporation

File: B-405155.3

Date: October 3, 2011

William L. Walsh, Jr., Esq., J. Scott Hommer III, Esq., George W. Wyatt IV, Esq., and Brendan M. Lill, Esq., Venable LLP, for the protester.
Col. Mark S. Teskey, and W. Michael Rose, Esq., Department of the Air Force, for the agency.
Paul E. Jordan, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs where procuring agency took corrective action after parties were informed through alternative dispute resolution (ADR) procedures the protest was clearly meritorious.

DECISION

Science Applications International Corporation (SAIC), of McLean, Virginia, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging a determination by the Department of the Air Force to eliminate SAIC's proposal--based on an alleged organizational conflict of interest (OCI)--from the competition under request for proposals No. FA8707-11-R-0007, for the Air and Space Operations Center weapon system modernization program.

We grant the request.

SAIC protested that the agency unreasonably determined that the protester had an unequal access to information OCI which disqualified it from participating in the competition; that it failed to treat all offerors equally in this regard; and that it failed to follow the requirements of the Federal Acquisition Regulation (FAR). In response to SAIC's protest, the agency submitted a report to which SAIC filed comments and a supplemental protest. After the agency submitted a supplemental report and SAIC submitted its comments, the cognizant GAO attorney held an alternative dispute resolution (ADR) conference, in which he engaged in outcome prediction. He advised the parties that it was not clear from the record that the agency's

determination to exclude SAIC was reasonable or that the agency had followed applicable regulations in excluding SAIC. The GAO attorney did not recommend that SAIC be included in the competition, but suggested that the agency follow the requirements of FAR § 9.506 and document the process and, either revise its determination and findings (D&F) to ensure its clarity, or provide SAIC an opportunity to respond to the agency's concerns in the D&F, clearly documenting whatever approach it ultimately adopts.

Subsequently, the agency advised our Office that it was electing to take corrective action. Specifically, the agency intends to document its compliance with FAR § 9.506; amend the RFP as necessary; prepare a new D&F document for SAIC's review and comment; a new final D&F if required; and take other corrective action as deemed appropriate. Air Force Proposed Corrective Action Letter at 1. We dismissed the protest as academic (B-405155, B-405155.2, Aug. 16, 2011).

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Our willingness to inform the parties through outcome prediction ADR that a protest is likely to be sustained, as we did here, is generally an indication that the protest is viewed as clearly meritorious, and satisfies the "clearly meritorious" requirement for purposes of recommending reimbursement of protest costs. National Opinion Research Ctr.-Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. AGFA HealthCare Corp.-Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Here, the agency acknowledges that it took corrective action in response to the ADR conference and states that it will consider a timely claim from SAIC for its reasonable costs, based upon a recommendation from our Office. Based on the clearly meritorious nature of the issues, and the agency's undue delay in taking corrective action, we recommend that SAIC be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. SAIC should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Lynn H. Gibson
General Counsel